

## MEMORANDUM

SUBJECT: Acid Rain Guidance on Phase II Permitting, NO<sub>x</sub>, and Opt-ins

FROM: Brian J. McLean, Director, Acid Rain Division

TO: Air, Pesticides, and Toxics Division Directors  
Regions I, IV, and VI

Air and Waste Management Division Director  
Region II

Air and Toxics Division Directors  
Regions III, VII, VIII, IX, and X

Air and Radiation Division Director  
Region V

By January 1, 1996, approximately 700 Phase II acid rain permit applications must be submitted by affected sources to state<sup>1</sup> permitting authorities, or to EPA. The purpose of this memorandum<sup>2</sup> is to (1) define who should receive these permit applications, (2) describe to what degree states without approval of their title V and title IV programs by November 15, 1995 can take part in the acid rain permitting process, and (3) to receive your comments on our current assessment of the status of states' acid rain or title V regulations (set forth in Attachment A). Also discussed (in Attachment B) are state acid rain program issues regarding NO<sub>x</sub>, opt-ins, and the treatment of affected sources with new or retired unit exemptions.

Late last year a number of Headquarters offices (OAP, OAQPS, OGC, and OECA) and the Regional title IV and title V contacts concluded that if, by November 15, 1995, a state had interim or full approval of its operating permits program and acceptable acid rain regulations, it could receive Phase II acid rain permit applications covering SO<sub>2</sub> and issue permits; but if it did

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<sup>1</sup> The term 'state' in this guidance means state or local permitting authorities.

<sup>2</sup> The policies set out in this memorandum are intended solely as guidance, do not represent final EPA action, and cannot be relied upon to create any rights enforceable by any party.

not, the appropriate EPA Region would receive and begin processing the acid rain permit applications for that state. After further discussion, we are recommending a new approach that offers more flexibility in enabling states without accepted title IV and/or approved title V programs by November 15, 1995, to at least begin the process of issuing title IV permits covering SO<sub>2</sub> without jeopardizing the integrity of the permits or the Acid Rain Program.

Attachment A is a draft categorization of all state permitting authorities that have established, or are expected to establish, acid rain programs. Under the new approach, each state permitting authority is placed into one of three categories:

Category A: States that can issue acid rain permits covering SO<sub>2</sub>

Criteria: The state must have either (1) an EPA-approved title V program and accepted title IV regulations<sup>1</sup>, with the approval and acceptance noticed in the Federal Register, or (2)(i) an EPA-approved title V program noticed in the Federal Register and title IV regulations in place that are not yet accepted but that aren't missing elements critical to the issuance of the initial acid rain permits covering SO<sub>2</sub>, and (ii) a written commitment to make the changes necessary for its title IV regulations to be accepted.

Category B: States that can receive Phase II acid rain permit applications covering SO<sub>2</sub>, perform completeness reviews, and process the permit up to issuance of a draft permit

Criteria: The state must (1) have state-final and effective title V operating permits rules (even though EPA may not yet have approved the title V program) with the title IV-related provisions required by 40 CFR part 70 and (2) have made sufficient progress in developing and obtaining EPA approval of a title V program and acceptance of title IV regulations to ensure Phase II acid rain permits will be issued by the December 31, 1997 statutory deadline.

Category C: States that cannot receive original acid rain permit applications covering SO<sub>2</sub>

Criteria: The state (1) lacks a state-final and effective title V operating permits rule or (2) has a state-final and effective title V operating permits rule in place that lacks title IV-related provisions required by 40 CFR part 70, or (3) has not made sufficient progress in developing and obtaining EPA approval of a title V program and acceptance of title IV regulations to ensure Phase II acid rain permits will be issued by the December 31, 1997 statutory deadline.

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<sup>1</sup> The term "title IV regulations" means incorporation by reference of 40 CFR part 72 or promulgation of regulations that closely approximate EPA's model acid rain rule.

States that are in categories A or B as of November 15, 1995 would receive and begin acting on acid rain permit applications covering SO<sub>2</sub>. States in category C as of November 15, 1995 would not receive original acid rain permit applications covering SO<sub>2</sub>; affected sources in such states would submit their original acid rain permit applications to the appropriate EPA Region and copies to the state.

Attached is a draft list identifying the category (A, B, or C) that Headquarters believes is applicable to each state permitting authority as of August 1995. Please review the draft categorizations, note the placement of your states, and offer any comments or corrections by September 14th. Once consensus is reached on the proper categorization of the states, the list will be placed on the TTN electronic bulletin board and will be updated as needed. On or before November 15, 1995, we plan to publish in the Federal Register a notice summarizing the status of all states' acid rain programs as of that date.

The possibility of EPA receiving some Phase II permit applications (for those states in category C on November 15) has in turn prompted questions regarding when EPA would issue Phase II acid rain permits if a state failed to establish, in a timely manner, an approved title V program and accepted title IV regulations. I believe EPA Headquarters and the Regions should be prepared to begin issuance of Phase II acid rain permits for states that do not have approved title V programs and accepted title IV regulations by January 1, 1997.

Comments and questions can be forwarded to me at (202) 233-9150, or to Robert Miller at (202) 233-9077.

#### Attachments

cc:     Regional Acid Rain Contacts Mike Trutna, OAQPS  
         Regional Title V Contacts                      Kirt Cox, OAQPS  
         Adan Schwartz, OGC                              Joanna Swanson, OAQPS  
         Pat Embrey, OGC                                    Ann Bailey, OECA

### Attachment A

(ARD assessment of status of state acid rain programs as of December 15, 1995)

	Category A	Category B	Category C
Region 1		Connecticut Massachusetts New Hampshire Rhode Island* Vermont*	Maine
Region 2		New Jersey	New York
Region 3	West Virginia	Delaware Washington D.C.* Maryland* Pennsylvania* Allegheny Co.*	Virginia
Region 4	South Carolina Florida	Alabama* Huntsville Jefferson Co.(AL) Georgia* Kentucky* Jefferson Co.(KY)* Memphis-Shelby Co. Mississippi* North Carolina Western Carolina Tennessee Nashville-Davidson Co.* Chattanooga- Hamilton Co.* Knox Co.*	
Region 5	Illinois Indiana Minnesota Wisconsin	Michigan* Ohio*	

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\* Indicates a state that is likely to shift to category A by the end of 1995.

	Category A	Category B	Category C
Region 6	Albuquerque Arkansas Louisiana New Mexico	Oklahoma Texas	
Region 7	Iowa Nebraska Omaha Lincoln-Lancaster	Kansas* Missouri	
Region 8	Colorado North Dakota South Dakota Utah	Montana Wyoming	
Region 9	Bay Area Clark Imperial Monterey Bay North Coast	Arizona* Maricopa* Pima* Pinal* Mojave Desert* San Diego* San Luis Obispo* South Coast Ventura* Nevada*	
Region 10	Oregon Washington Northwest Olympic Puget Sound Southwest Spokane Co. Benton-Franklin Co. Yakima Co.	Idaho	

## **Attachment B**

### Title V and Acid Rain Exemptions

Questions have been raised regarding the treatment of affected units that have received new or retired unit exemptions from EPA or that expect to apply for and receive an exemption in the near future. Under 40 CFR part 72, units with new or retired unit exemptions are still affected units, and sources that include such units are still affected sources (see 40 CFR 72.2 (definitions of "affected unit" and "affected source")). Under 40 CFR 70.3(a)(4), state title V programs must provide for permitting of, inter alia, "any affected source." The purpose of the new and retired unit exemptions is to allow certain affected sources to avoid permitting requirements; it would therefore be inconsistent to require exempted sources to obtain title V operating permits solely because they are affected sources. We therefore believe that 40 CFR part 70 should be interpreted to mean that title V operating permits should be issued only to those affected sources that are required to have acid rain permits. Affected sources that are exempt from acid rain permitting and that are not subject to any other requirements under the Clean Air Act that would necessitate an operating permit should not be required to apply for or obtain an operating permit.

### Phase II NO<sub>x</sub>

Forty CFR part 76, establishing NO<sub>x</sub> permitting procedures and compliance plans and standard NO<sub>x</sub> emission limitations for Group I boilers, was promulgated as a final rule on April 13, 1995. As required under title IV, the Acid Rain Division is currently preparing additional NO<sub>x</sub> regulations setting emission limitations for Group 2 boilers and considering revision of Group 1 boiler emission limitations in Phase II. Those regulations, which will amend the current 40 CFR part 76, are scheduled to be proposed by the end of this year and issued as final by the January 1, 1997 statutory deadline. NO<sub>x</sub>-affected sources must submit their Phase II NO<sub>x</sub> permit applications by January 1, 1998, and permitting authorities must incorporate NO<sub>x</sub> compliance plans into the acid rain portion of operating permits by early 1999.

States must adopt 40 CFR part 76 as part of their acid rain regulations and title V program and submit their NO<sub>x</sub> regulations for EPA review. The NO<sub>x</sub> regulations must be submitted in time (i.e., by October 1, 1997) so EPA review can be completed by the time the Phase II acid rain permit applications covering NO<sub>x</sub> are submitted (i.e., by January 1, 1998) and the 60-day period for completeness review of the applications ends.

A state that can receive Phase II acid rain permit applications covering SO<sub>2</sub> will also have similar authority with regard to Phase II acid rain permit applications covering NO<sub>x</sub>. However, a state cannot issue draft and final acid rain permits covering NO<sub>x</sub> without a NO<sub>x</sub> rule in place that is accepted by EPA and includes Phase I and Phase II emission limitations.

The Acid Rain Division recommends that states incorporate by reference 40 CFR part 76,

if possible, and that they do so before the promulgation of the Phase II NO<sub>x</sub> rule for the following reasons. First, the narrow time frame described above will make it difficult for many states to wait for the January 1, 1997 rule to be promulgated and then establish NO<sub>x</sub> authority before the end of the period for completeness review of the NO<sub>x</sub> applications. Second, existing part 76 already contains the bulk of the Acid Rain NO<sub>x</sub> provisions. In particular, the procedures that states must follow in processing every type of NO<sub>x</sub> compliance plan are already established in the current NO<sub>x</sub> rule, and will not be revised in the Phase II rulemaking. The Phase II NO<sub>x</sub> rule will simply add standard NO<sub>x</sub> emission limitations for boiler types not covered by the existing rule and may revise the emission limitations already set for Group I boilers.

Because of the limited nature of the future changes to the existing part 76 and because the changes will be proposed in the near future, EPA believes that the most efficient approach for a state to develop a complete NO<sub>x</sub> rule is to begin now to adopt the existing part 76. There are several ways of doing this:

First, a state may employ the following language to incorporate by reference 40 CFR part 76:

*"The [name of permitting authority] hereby adopts and incorporates by reference 40 CFR part 76 in effect on [date of action], as amended under section 407(b)(2) of the Clean Air Act, 42 U.S.C. 7651f(b)(2)."*

This language enables a state to adopt the rule now and automatically incorporate the emission limits to be promulgated in the Phase II NO<sub>x</sub> rulemaking. However, states may lack the legal authority to incorporate rule amendments that are not final at the time of the incorporation.

Second, states may choose to issue a proposed rule adopting by reference the existing part 76 and including the proposed emission limitations in the Phase II NO<sub>x</sub> rulemaking (to be promulgated by the end of 1995). The state could then include in its final rule the final emission limitations adopted in the Phase II NO<sub>x</sub> rulemaking (to be completed by January 1, 1997) and thereby have a complete NO<sub>x</sub> rule in place in early 1997.

A model NO<sub>x</sub> rule will also be made available to those states who cannot or do not wish to incorporate by reference 40 CFR part 76. Whatever method states choose, they should begin now to establish their NO<sub>x</sub> regulations and submit them for EPA review no later than October 1, 1997. As with the SO<sub>2</sub> portion of the Acid Rain Program, public notice of the status of states' NO<sub>x</sub> programs will be made through the Federal Register and the EPA's Technology Transfer Network electronic bulletin board.

## Final Opt-in Rule

The combustion source portion of the opt-in rule (40 CFR part 74), in which non-affected combustion sources of SO<sub>2</sub> can elect to become affected units, was published on April 4, 1995 and became final and effective as of May 4, 1995. The opt-in permit application forms have been completed and distributed to the Regional Acid Rain contacts and are also available on the TTN electronic bulletin board.

A combustion source voluntarily elects to become an affected unit by opting in and therefore must be covered by a title V permit as required under 40 CFR 70.3(a)(4). A state may adopt opt-in regulations in advance but will not be required to adopt such regulations until a potential opt-in source within its jurisdiction submits an opt-in permit application. Where a state does not adopt opt-in provisions in advance, EPA will issue the initial opt-in permit, and with the submission of an opt-in permit application, the state where the source is located should begin the adoption process. The state will be expected to adopt opt-in regulations as part of its title V operating permits program and obtain EPA approval before the initial EPA-issued opt-in permit expires. States are again encouraged to incorporate by reference, if possible; a model rule will be made available, if needed.

The Administrator recently signed a delegation of authority for opt-in sources that is similar to the delegations for processing Phase I and Phase II units. Initial opt-in permits will be issued by the Regions, allowance allocations will be handled by the Acid Rain Division, and monitoring plans and certifications will be handled by the Regions and the Acid Rain Division.